

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, (IBT), LOCAL 957
(United Parcel Service)

Case 09-CB-255762

and

RYAN BLACK, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO
THE ADMINISTRATIVE LAW JUDGE

I. Statement of the Case

This matter is before Administrative Law Judge Kimberly Sorg-Graves upon General Counsel's complaint which issued on April 24, 2020 based on a charge filed by Charging Party Ryan Black (Black). The complaint alleges that the International Brotherhood of Teamsters, Local 957 (Respondent) violated Section 8(b)(1)(A) of the Act by failing to provide Black with information that he requested about his pending grievances. The administrative hearing on the allegations of the complaint was held on August 26, 2020 via video teleconference.

The Union's failure to provide any substantive information to Black about his grievances goes beyond "mere negligence" and should be considered a violation of Respondent's duty of fair representation to bargaining unit members as the exclusive collective-bargaining representative of the Unit. (G.C. Ex. 1(c))^{1/} The evidence produced at the hearing demonstrates that Black made repeated requests over the course of 5 months seeking information about the excessive overtime grievances that he had filed with Respondent and that Respondent failed to

^{1/} References to the transcript record will be designated as (Tr. ____); references to General Counsel's Exhibits will be designated as (G.C. Ex. ____); and references to Respondent's Exhibits will be designated as (R. Ex. ____).

provide Black with any information. As such, Counsel for the General Counsel urges that that Your Honor find Respondent to be in violation of the Act as alleged in the complaint.

II. Facts

Ryan Black is a full-time package delivery driver with United Parcel Service (the Employer or UPS). Black began working for the Employer in 1993 and has been represented for the purpose of collective bargaining by Respondent throughout his tenure. (Tr. 41) The Employer and Respondent have a collective-bargaining agreement (CBA) in place that provides for a grievance and arbitration procedure between the parties. (G.C. Ex. 2) Article 37 of the CBA also provides that full-time drivers (like Black) who opt-in on the “9.5 list” have the right to file a grievance if the Employer has “continually worked a driver more than nine and one half (9.5) hours per day for any three (3) days in a workweek.” (Id.; See also Tr. 43-44) Aggrieved employees may receive up to triple pay for excessive overtime hours. Id.

a. Black files grievances for excessive overtime on July 26 and September 17, 2019.

Black filed grievances for excessive overtime with the Union on July 26, 2019 (G.C. Ex. 4(a)) and September 17, 2019 (G.C. Ex. 4(b)), claiming that he was owed pay for excessive overtime under Article 37. (Tr. 44-50) Black submitted these grievances to Union Steward Matt Thomes. Starting with the filing of his July 26, 2019 grievance, and continuing through January 2020, Black followed up with Thomes on a near daily basis asking Thomes when his grievance(s) would be heard [at a local hearing]. (Tr. 51) Black, who began following-up with Thomes on or about August 26, 2019, would ask Thomes during these conversations about whether his 9.5 grievances were scheduled to be heard, when he could expect his grievances to be heard, and whether or not Thomes knew anything more about when more local hearings were being conducted. (Tr. 57-58) These follow-up conversations occurred both in

person before the morning shift began (Tr. 51) and over the phone. (Tr. 62-79) Thomes would consistently tell Black that he had given the grievances to Local Union President/Business Agent Kenny Howard, and that he did not have any more information from Howard to provide to Black. (Tr. 57-59)

b. Black contacts Union President/Business Agent Kenny Howard directly on two different occasions after Thomes fails to provide responsive information concerning his grievances.

On September 20, 2019, at 12:47 p.m. via his personal cell phone, Black reached out to Howard, personally, for the first time. Black called Howard to get information on the status of his grievances. (Tr. 67, 72) He left a message for Howard asking that Howard call him back as soon as he could and left his name and number.^{2/} (Tr. 67) Howard never returned this call. (Tr. 67) Black then continued to follow up regularly with Thomes about his grievances between September 2019 and January 2020, always getting the same answers - that Thomes could not answer his questions because Howard was the person handling his grievances. (Tr. 57-59)

On January 28, 2020, Black sent the following text message to Howard at around 12:56 p.m. “The last time I called, you never got back with me. How long, in your eyes, is acceptable to wait for money grievances to be heard? What you and the company have done is ILLEGAL . . . This is the last time I contact you regarding my grievances.” Black also included several screen shots of the NLRB website. (G.C. Exs. 6(a)-(b)) Following this conversation he called Thomes at 1 p.m. (the same day) and the two talked for 63 minutes. (G.C. Ex 5, p. 111) They talked again at 2:58 p.m. for 6 minutes, and yet again at 3:52 p.m. for 14 minutes. (G.C. Ex. 5, p. 111) During

^{2/} Although Respondent disputes the fact that Black left a message for Howard, Black’s phone records (G.C. Exs. 4(a) and 5(c)) show that he made a 2-minute phone call to Howard on the time and date he alleges. Although Respondent will argue that Howard’s phone bill (R. Ex. 11) does not show a voicemail was left, that exhibit and Respondent’s other phone record exhibits covering other months (R. Exs. 7-14) do not show *any* of the voicemails that Howard received over that time and therefore does not rebut Black’s testimony and evidence that he called and left Howard a voicemail.

these conversations Black discussed with Thomes his frustration with not having any information about his grievances for such a long time. Black felt like his “wheels were spinning.” (Tr. 80) Even though Black had left a voicemail for Howard in September 2019 and followed up with Howard via his January 2020 text message indicating that Howard had still not responded to his inquiries, Howard never spoke with Black directly or contacted him in any way about his grievances. (Tr. 80)

Furthermore, even after the instant charge was filed and a complaint issued, neither Howard nor Thomes contacted Black to provide him any information about the local level hearings that were eventually held over his grievances (G.C. Exs. 3A and B) Black’s uncontroverted testimony is as follows:

Q. Were you given notice of any grievance hearings or local level hearings regarding the two grievances that we discussed today, which I believe are General Counsel's Exhibit 3A and B?

A. No, I was not.

Q. Were -- did you attend any local level hearings over your grievances that are in General Counsel's Exhibits 3A and B?

A. I did not.

Q. When did you find out that the local level grievance hearings on these grievances were heard?

A. I found out on the 13th [of August 2020].

Q. And how did you find out the resolution to those grievances?

A. Several of my coworkers received texts that their grievances were heard and paid.

c. Howard and/or Thomes had the information Black was seeking about his grievances, but neither provided it to Black.

As Respondent admits in its answer, Howard and Thomes are both Respondent’s agents. (G.C. Ex. 1(g) para. 4 and 1(e) para. 4) During both direct (Tr. 212, 229-231) and cross

examination (Tr. 244-245, 275, 279), Howard testified that, although he coordinates with the employer over the time and date of local level hearings, he delegates to the Union stewards the task of determining which grievances will be heard at those hearings. He also relies on the stewards to communicate to bargaining unit members a lot of information about their grievances such as when their grievances are scheduled to be heard (Tr. 246, 279), which types of grievances will be heard (Tr. 244-245, 279), that certain types of grievance hearings are on hold pending arbitration (Tr. 251), or that grievance hearings are on hold while he is on vacation. (Tr. 274) He also testified that it is important for Union stewards to know what is going on with the grievances pending a local hearing (Tr. 275), and that Thomes could have answered Black's questions about whether his grievances were being scheduled. (Tr. 279) Howard also confirmed that it would not be reasonable for all approximately 900 UPS employees that he represents at local level hearings to reach out to him directly for information about their grievances. (Tr. 276) According to Howard, bargaining unit members asking about their grievances, "really should contact their steward, and the steward, you know, tells them what's going on with it." (Tr. 276:5-7)

Notwithstanding Howard's understandable reliance of union stewards to schedule grievances and communicate their status to unit members, he admitted that he maintains open lines of communication with the bargaining unit. (Tr. 200-201, 220-226) For example, he noted that the bulk of his numerous phone records were with bargaining unit members, even answering his phone and checking his voicemails while on vacation. (Tr. 219:22 - 221:22) In the case of Black, however, Howard decided to cut off communication after Black implied in his January 2020 text that he was willing to file charges with the NLRB if Howard did not respond to his inquiries. (Tr. 236)

III. Legal Analysis

a. Respondent's continued failure to provide Black with the information he requested about his grievances, including after he raised the issue of filing charges with the Board, constitutes arbitrary conduct violative of Section 8(b)(1)(A).

In processing a grievance, a union retains broad discretion in disposing of the grievance short of arbitration, however, a union breaches its duty of fair representation to the bargaining unit it represents by engaging in conduct which is arbitrary, discriminatory, or in bad faith. See, *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) A violation turns not on the merits of the grievance, but rather on whether the union exercised its discretion in a perfunctory or arbitrary manner. *Id.* A union's mere negligence, alone, does not rise to the level of arbitrary conduct. See, *Teamsters Local 692 (Great Western Unifreight)*, 209 NLRB 446 (1974). However, perfunctory or arbitrary conduct can constitute more than mere negligence and be considered a violation of the Act. See, *Service Employees Local 579 (Convacare of Decatur)*, 229 NLRB 692 (1977) (little or no investigation in connection with a discharge grievance); see also, *Teamsters Local 315 (Rhodes & Jamieson)*, 217 NLRB 616 (1975) ("A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority"). The Board examines the totality of the circumstances in evaluating whether a union's grievance processing was arbitrary. See, *Office Employees Local 2*, 268 NLRB 1353, 1354-1356 (1984). Here, the Union (through Howard) made the affirmative decision to cut-off communication with Black in January 2020 because he implied that he was willing to file a charge with the NLRB.^{3/} This was not a case of a missed call or voicemail by a busy union president and business agent,

^{3/} Although Respondent may argue that Thomes, Black's union steward, remained in contact with Black, Black's uncontroverted testimony is that Thomes was unable to answer even basic questions about the status of his grievances from August 2019 through January 2020 and beyond.

Howard admits that he did not respond to Black because he had threatened to file Labor Board charges. (Tr. 236)

The Board has made clear legal precedent that a Union is obligated to provide requested information to its members concerning matters related to their terms and conditions of employment. In *Retail Clerks Local 324 (Fed Mart Stores)*, 261 NLRB 1086 (1982), the Board affirmed the administrative law judge's analysis that when a union purposefully misinforms or keeps uninformed a grievant regarding the status of the grievance it violates its duty of fair representation under the Act. "The Respondent failed to comply with its obligation to refrain from misinforming [Charging Party] concerning the manner in which it would process her grievance, and then proceeded to process her grievance in an apathetic, perfunctory, and arbitrary manner, all in violation of its duty to fairly represent [Charging Party], thereby violating Section 8(b)(1)(A) of the Act." *Id.* at 13. The Board has also held that it is unlawful to treat bargaining unit members differently because they have filed a charge with the Board. See, *Graphic Arts International Union 96B (Williams Printing)*, 235 NLRB 1153, (1978); *Steelworkers Local 3029 (Gardner- Denver)*, 250 NLRB 813 (1980).

In the instant matter, either Thomes misinformed Black about the grievance handling process when he told Black that Howard handles the grievance hearings himself (Tr. 52:6-8), or Howard lied during his testimony when he said it is the stewards who determine which cases are heard. (Tr. 204:3-9) The Union had a duty to inform Black of the status of his grievance when he requested that information, and engaged in more than mere negligence when Howard decided to cut off communication with Thomes about his grievances after he implied that he would be filing a charge against the Union if Howard did not answer his inquiries.

A union's failure to communicate decisions related to a grievance or to respond to inquiries for information or documents by the charging party, in the General Counsel's view, constitutes more than mere negligence and, instead, rises to the level of arbitrary conduct unless there is a reasonable excuse or meaningful explanation. Here, the Union arbitrarily failed to provide Black with information throughout the pendency of his grievances at the local level. Although Black only contacted the union president/business agent directly twice (on September 20, 2019 and January 28, 2020), Black was in regular contact with his union steward (Thomes) throughout that time. Thomes never provided Black with the information he sought, even though the record establishes that the Union relies on its stewards to provide information about the status of grievances. This alone is a violation of Section 8(b)(1)(A), especially considering that it was Thomes himself who had the authority to place "money grievances" on the agenda to be heard at the local level hearings scheduled by Howard.

Thomes did not tell Black that he was the one who decided which grievances would be heard, but rather told him that Howard had total control over when those types of grievances would be heard. When Black initially reached out to Howard to find out about the status of his pending grievances, on September 20, 2019, Howard never responded. Then, after 4 months of Thomes telling Black that he (Thomes) had no control over Black's pending grievances, Black sent a text on January 28, 2020, notifying Howard that he would be filing charges with the Board if Howard did not respond. Howard's response was to cut off communication with Black entirely.

Howard testified at the hearing that he was "advised by counsel, by other business agents at other locals" not to contact any bargaining unit employees who say that they are going to file labor board charges against Respondent. (Tr. 236:12-20) However, the thrust of

Section 8(b)(1)(A) is to protect bargaining unit employees from conduct that is arbitrary, discriminatory or in bad faith. Ceasing communication with a bargaining unit employee who, out of frustration with the grievance/arbitration process, indicates he is willing to file charges with the NLRB is a clear violation of the duty of fair representation. Howard testified at length about the strides he takes to maintain communication with the roughly 900 employees he represents directly as Respondent's business agent. He spends nights, weekends, and vacation days communicating with bargaining unit members. By excluding Black (or any bargaining unit member exercising their Section 7 right to file Board charges) from those lines of communication, Respondent has violated Section 8(b)(1)(A) of the Act. A labor organization whose policy is to restrict communication with bargaining unit members for exercising their Section 7 rights is precisely what Section 8(b)(1)(A) tries to curtail. The lingering threat of having communication cut-off would necessarily deter bargaining unit members from exercising those rights and should be considered unlawful.

IV. Proposed Notices

Counsel for the General Counsel urges Your Honor to consider the proposed attached Notice to Employees as part of the remedy in this case.

V. Conclusion

Respondent has a duty to fairly represent each of the employees it represents for the purposes of collective bargaining under the National Labor Relations Act, and it is unlawful for a labor union to restrain or coerce employees in the exercise of their rights under the Act. To be clear, this case is not about whether a single missed voicemail or text message by Respondent implicates a violation of the Act. Rather, it is about failing to provide a unit member with information requested about pending grievances; about whether it is appropriate under the Act

for a labor union to misinform a bargaining unit member for months about who controls when his grievance will be scheduled to be heard; and about whether it is appropriate to cut off communication and refuse to respond to a unit member when that unit member indicates that he is willing to exercise his rights under Section 7 of the Act.

Given the foregoing, Counsel for the General Counsel maintains that the evidence supports the finding that Respondent's conduct in this matter violates Section 8(b)(1)(A) of the National Labor Relations Act.

Dated: September 30, 2020

A handwritten signature in black ink, appearing to read 'E. Brinker', with a stylized, cursive script.

Erik P. Brinker, Counsel for the General Counsel
Region 9, National Labor Relations Board
Room 3-111, John Weld Peck Federal Building
550 Main Street
Cincinnati, OH 45202-3271

Attachment A

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT willfully fail to communicate with you and provide you with information about the status of your grievances.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL communicate with Ryan Black and provide him with information about his grievances and **WE WILL** communicate with and provide information to any employee we represent for the purposes of collective bargaining who requests information about his or her grievances.

**International Brotherhood of Teamsters, (IBT)
Local 957**

(Labor Organization)

Dated: _____

By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

550 MAIN ST
RM 3-111
CINCINNATI, OH 45202-3271

Telephone: (513)684-3686
Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Centralized Compliance Unit at complianceunit@nrlrb.gov

CERTIFICATE OF SERVICE

September 30, 2020

I hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on all parties by regular and electronic mail at the addresses listed below:

Kenny Howard, Union President
International Brotherhood of Teamsters,
(IBT) Local 957
PO Box 13357
Dayton, OH 45413-0357

Joe Mulikin, Labor Relations Manager
United Parcel Service
225 W. Alex
West Carrollton, OH 45449

John R. Doll, Esq.
Doll, Jansen & Ford
111 W First St., Suite 1100
Dayton, OH 45402-1156
Email: jdoll@djflawfirm.com

Ryan Black, Delivery Driver
1056 East Central Avenue
Miamisburg, OH 45342
Email: ryanblack64@gmail.com



Erik P. Brinker, Counsel for the General Counsel
Region 9, National Labor Relations Board
Room 3-111, John Weld Peck Federal Building
550 Main Street
Cincinnati, OH 45202-3271